

**Minnesota Sentencing Guidelines Commission**  
**Approved Meeting Minutes**  
**October 17, 2013**

The Minnesota Sentencing Guidelines Commission (MSGC) meeting was held on October 17, 2013 in the Pung Conference Room at the Department of Corrections (DOC), 1450 Energy Park Drive, St. Paul, Minnesota. Commission members present were Chair Jeffrey Edblad, Hon. Christopher Dietzen, Sgt. Paul Ford, Connie Larson, Hon. Carrie Lennon, DOC Commissioner Tom Roy, Hon. Heidi Schellhas, John Stuart, and Yamy Vang. MSGC staff members present were Executive Director Kelly Mitchell, Jackie Braun, Jill Payne, and Anne Wall. Also present were Jim Early from the Attorney General's Office and Ben Schweigert from the Hennepin County Attorney's Office.

**1. Call to Order.**

The meeting was called to order at 2:00 p.m.

**2. Approval of Meeting Minutes from September 19, 2013.**

A member pointed out that the draft minutes referenced the incorrect law school. The minutes were amended to state that Professor Sampsell-Jones is from William Mitchell College of Law.

**Motion** to approve minutes as amended was made by Hon. Carrie Lennon and seconded by Jason Anderson.

**Motion carried.**

**3. Proposal to Add a Statutory Maximum Appendix for Guidelines**

Staff explained that twelve offenses have presumptive durations that may exceed the statutory maximums depending on the offender's Criminal History Score. Practitioners will often use the Guidelines to determine the presumptive sentence without checking the statutory maximum in statute for the offense. If practitioners do not check the statute, these offenses may receive a sentence that would exceed the statutory maximum. The Guidelines state that when "the presumptive sentence duration in the appropriate cell on the applicable Grid exceeds the statutory maximum sentence for the conviction offense, the statutory maximum is the presumptive sentence." Staff recommends adding an appendix to the Guidelines that will highlight the offenses for which this may occur, amend the footnotes on the grids, add a reference in § 2.C.2, to the new appendix (Appendix 3), and add footnotes to the applicable offenses in § 5.B, as it is used by practitioners to quickly locate the severity levels for offenses.

**Motion** to adopt staff recommendations was made by Sgt. Paul Ford and seconded by John Stuart.

A member noted concern with addressing these issues at several different meetings because there could be problems with cross references. Staff informed members that all changes will be brought back before the Commission before publication as one document with all of the changes together.

**Motion carried.**

## **2.C. Presumptive Sentence**

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2. Presumptive Sentence Durations that Exceed the Statutory Maximum Sentence. If the presumptive sentence duration in the appropriate cell on the applicable Grid exceeds the statutory maximum sentence for the conviction offense, the statutory maximum is the presumptive sentence. See Presumptive Sentence Durations that Exceed the Statutory Maximum Sentence Table in Appendix 3.

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### **Appendix 3. Presumptive Sentence Durations that Exceed the Statutory Maximum Sentence Table**

This table is for convenience when determining if a presumptive duration exceeds the statutory maximum sentence as described in section 2.C.2. Offenses identified in the table below have presumptive durations that exceed the statutory maximums at the Criminal History Score (CHS) indicated on the table. These are offenses for which the applicable grid does not adjust the duration or range to be at or below the statutory maximum. The table may not be exhaustive.

<u>Statute</u>	<u>Offense</u>	<u>Severity Level</u>	<u>Statutory Maximum (Months)</u>	<u>Exceeds Statutory Maximum At:</u>
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<u>Statute</u>	<u>Offense</u>	<u>Severity Level</u>	<u>Statutory Maximum (Months)</u>	<u>Exceeds Statutory Maximum At:</u>
<u>609.2231 subd. 4(b)</u>	<u>Assault 4th Degree Motivated by bias</u>	<u>1</u>	<u>12, and one day</u>	<u>CHS 3</u>
<u>609.322 subd. 1(a)</u>	<u>Solicits, Promotes, or Receives Profit Derived from Prostitution; Sex Trafficking 1<sup>st</sup> Degree</u>	<u>B</u>	<u>240</u>	<u>CHS 5</u>
<u>609.352 subd. 2</u>	<u>Solicitation of Children to Engage in Sexual Conduct</u>	<u>G</u>	<u>36</u>	<u>CHS 4</u>
<u>609.352 subd. 2a</u>	<u>Solicitation of Children to Engage in Sexual Conduct (Electronic)</u>	<u>G</u>	<u>36</u>	<u>CHS 4</u>
<u>609.485 subd. 4(a)(2)</u>	<u>Escape, Mental Illness</u>	<u>1</u>	<u>12, and one day</u>	<u>CHS 3</u>
<u>609.485 subd. 4(a)(4)</u>	<u>Escape from Civil Commitment</u>	<u>1</u>	<u>12, and one day</u>	<u>CHS 3</u>
<u>609.595 subd. 1a(a)</u>	<u>Damage to Prop Motivated by Bias</u>	<u>1</u>	<u>12, and one day</u>	<u>CHS 3</u>
<u>609.597 subd. 3(3)</u>	<u>Assaulting or Harming Police Horse</u>	<u>1</u>	<u>12, and one day</u>	<u>CHS 3</u>
<u>609.662 subd. 2(b)(2)</u>	<u>Duty to Render Aid (Substantial Bodily Harm)</u>	<u>1</u>	<u>12, and one day</u>	<u>CHS 3</u>
<u>609.713 subd. 3(a)</u>	<u>Terroristic Threats-Replica Firearm</u>	<u>1</u>	<u>12, and one day</u>	<u>CHS 3</u>

<u>Statute</u>	<u>Offense</u>	<u>Severity Level</u>	<u>Statutory Maximum (Months)</u>	<u>Exceeds Statutory Maximum At:</u>
<u>609.776</u>	<u>Interference with Emergency Comm.</u>	<u>5</u>	<u>36 months</u>	<u>CHS 4</u>
<u>617.247 subd. 3</u>	<u>Dissemination of Pictorial Representation of Minors</u>	<u>E</u>	<u>84 months</u>	<u>CHS 5</u>

### 5.B. Severity Level by Statutory Citation

Offenses subject to a mandatory life sentence, including first-degree murder and certain sex offenses under Minn. Stat. § 609.3455, subdivision 2, are excluded from the Guidelines by law.

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<b>Statute Number</b>	<b>Offense Title</b>	<b>Severity Level</b>
609.2231 subd. 4(b)	Assault 4th Motivated by bias	1 <sup>+</sup>
609.322 subd. 1(a)	Solicits, Promotes, or Receives Profit Derived from Prostitution; Sex Trafficking 1 <sup>st</sup> Degree	B <sup>+</sup>
609.352 subd. 2	Solicitation of Children to Engage in Sexual Conduct	G <sup>+</sup>
609.352 subd. 2a	Solicitation of Children to Engage in Sexual Conduct (Electronic)	G <sup>+</sup>
609.485 subd. 4(a)(2)	Escape, Mental Illness	1 <sup>+</sup>
609.485 subd. 4(a)(4)	Escape from Civil Commitment	1 <sup>+</sup>

\* Depending on the offender's criminal history score, the presumptive duration may exceed the statutory maximum. See section 2.C.2 and Appendix 3 to determine the presumptive duration.

<b>Statute Number</b>	<b>Offense Title</b>	<b>Severity Level</b>
609.595 subd. 1a(a)	Damage to Prop Motivated by Bias	1 <sup>+</sup>
609.597 subd. 3(3)	Assaulting or Harming Police Horse	1 <sup>+</sup>
609.662 subd. 2(b)(2)	Duty to Render Aid (SBH)	1 <sup>+</sup>
609.713 subd. 3(a)	Terroristic Threats-Replica Firearm	1 <sup>+</sup>
609.776	Interference with Emergency Communications	5 <sup>+</sup>
617.247 subd. 3	Dissemination of Pictorial Representation of Minors	E <sup>+</sup>

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#### **4. Ongoing Discussion of Controlled Substance Offender Study**

The Commission has previously discussed offenses with high departure rates and has focused on first- and second-degree drug offenses. The Commission invited practitioners and community members to discuss the research done by the Commission and their thoughts on the sentences for first- and second-degree controlled substance offenses.

##### **A. Round Table**

Commission members reflected on the discussion which took place at the Round Table. A member asked for more information on the previous discussions of these offenses that were mentioned at the round table. Members and staff stated that the Sentencing Guidelines Commission released a report in 2004 and again in 2007 on controlled substance offenses. There was a 2009 group appointed by the Governor that looked at this same topic involving many of the same people. A member asked those who had been part of the 2009 group whether the information was a repeat of what had been previously discussed. Members stated that it was very similar; however federal sentencing policy has changed and cases that used to go to federal court are now being handled at the state level.

A member proposed recommending to the Legislature to change the thresholds so that the commercial dealers who are working with pounds are separated out from low-level street dealers. The member further commented that many offenses that previously were sentenced federally are now sentenced at the state level and the

Legislature should address this. Another member noted that he did not interpret the conversation as advocating for lower sentences for those who have 10 grams. Members noted that there was a common theme of a need for a kingpin law regardless of any changes to durations, especially due to the policy changes in controlled substance sentencing at the federal level.

Another theme mentioned was that participants do not know why departure rates are so high. A member noted that it was interesting that a participant viewed consistency in sentencing with shorter sentences as a better deterrent than inconsistent sentencing with longer sentences.

A member noted that there are highly sophisticated dealers with no criminal history and wondered if there are other factors that should be considered in how the Commission designates first time offenders based on amount to take into account the increase in large drug offenses. Members also noted that they would like to hear more from the community, though it was noted by participants that even small amounts of 10 grams have a damaging effect on the community.

Another member mentioned being struck by the disparities in departures by judicial district even though the Guidelines are intended to eliminate disparity by geographical area. The member also noted that first- and second-degree controlled substance offenses are considered less serious than other offenses at the same severity level in practice. A member expressed concern about charge reductions being directly related to willingness to be a confidential informant, noting that it may not be an appropriate reason for departure.

A member stated that, because departure rates are so high, Minnesota does not have determinant sentencing for first- and second-degree controlled substance offenses. The member also expressed doubt that first-degree controlled substance offenders are kingpins as was intended by the Legislature.

A member expressed that departures based on agreements to assist in other investigations are not concerning. The member expressed doubt that low-level offenders are receiving an 86 month sentence. The member expressed concern about improving the business environment for drug offenders by reducing the sentence. The member stated that, because plea agreements are so important to drug investigations, lowering the duration would not increase certainty in sentencing.

A member noted being struck by the resounding cry of participants for the courts to have greater discretion rather than for reduction of departures. Another member noted that controlled substance offenses are unique because a

subsequent offense with a mandatory minimum is often the result of a relapse due to addiction. Several members agreed that mandatory minimums are problematic.

Kelly Mitchell noted hearing from participants that a large range of behaviors fall into the same statute and all are expected to receive the same sentence. There are other states that utilize sentencing options such as prison sentence waivers for first time offenders and those receiving treatment. It was noted that these options could be used rather than lowering the durations for all offenses.

A member noted that the behavior involved in the crimes could vary by geographical area. Some offenders in small communities may not be from the area and may only be present to sell drugs. This may explain part of the difference. Another member noted the communities in the 5th and 8th judicial district are very similar so this would not account for the difference. The member posed the question of whether high-level controlled substance offenses have increased consistency in sentencing under the Sentencing Guidelines than under the parole board. The member believes the parole board did not have geographical disparities. Another member noted that the Commission may learn more about this from the regression analysis and that there may be other factors involved such as settlements and differences in prosecutors.

A member stated that both the Legislature and the Commission could take action to adjust these sentences. The member asked members to consider the handout which shows the other offenses ranked at the same level. Another member noted that a common theme was that the Legislature should address the issue rather than the Commission.

A member asked for more information on whether gangs, assaults, or weapons were part of the offenses. Anne Wall noted that the data collected on cases in 2011 showed that weapons were not cited in most offenses and the “crime committed for the benefit of a gang” modifier was not charged in any of the 2011 offenses. Members discussed that generally violent offenses do not happen at the same time as sale or use of drugs but occur in order to protect territory or to obtain money to support an addiction. While there may not be a violent offense indicated on a complaint, it does not mean that the offense did not cause or lead to violent offenses.

Chair Edblad thanked Professor Kevin Reitz for moderating and the staff for their extra work helping to organize the event.

## **B. Regression Model**

Staff previously used descriptive statistics to show that departure rates vary by judicial district and by criminal history score but have not analyzed how the variables may interact. The Commission requested staff use a regression to analyze departure data for first- and second-degree controlled substance offenses. To help guide development of the regression model, staff reviewed scholarly articles which studied similar topics using a regression analysis.

Staff designed three models for regression based on sample size and limitations for variables. The variables selected for the model were chosen based on data which has a significant degree of variability between covariates rather than variables for which almost all offenses have the same covariate (for example, judicial district varies, but almost all offenders pled guilty rather than going to trial). The variables were also limited based on the number of categories per variable (for example, judicial district is used with only ten categories rather than county which includes over 80 categories). Limiting the variables considered is important to preserve the validity of the results. The regression will focus on judicial district, criminal history score, drug amount, and race/ethnicity.

A member asked whether it would be possible to survey prosecutors on the reasons for the plea agreement or departure in order to learn more about why prosecutors are settling cases. Members discussed the common reasons for plea agreements and how a survey could be drafted in order to learn what the primary reason for the agreement was in most cases. A member noted that agreement to be a confidential informant is an unlikely reason for a plea deal because the informant is generally not charged. Members stated that the offenders may agree to testify against another offender rather than being an informant. Other variables of potential importance noted by members are aiding and abetting, participation in drug court, and immigration status.

Commission members agreed to consider what variables they would like to include in a survey of county attorneys on the reasons for settlements on first- and second-degree controlled substance offenses.

## **8. Public Input**

Ben Schweigert from the Hennepin County Attorney's Office introduced himself and thanked the Commission for holding the round table; he stated that he learned a lot.

## **9. Other Business**

Department of Corrections will be increasing security at the central office. Since the Commission meetings are open to the public the Commission meetings will need to be



held elsewhere. Kelly Mitchell stated that there is a space available to hold meeting in the Administration Building where staff is located. Information of future meeting locations will be made available when the meetings are scheduled.

#### **10. Adjournment**

**Motion** to adjourn was made by Hon. Christopher Dietzen and seconded by Connie Larson.

**Motion carried.**

Chair Edblad adjourned the meeting at 3:45 p.m.